

ENVIRONMENTAL ADVOCATES

ATTORNEYS AT LAW
5135 Anza Street, San Francisco, California, 94121

Christopher Sproul, Esq.
Jodene Isaacs, Esq.

Telephone: (510) 847-3467
Facsimile: (415) 358-5695
Email: jisaacs@enviroadvocates.com

June 29, 2016

VIA E-MAIL

U.S. EPA, Region 4
Regional Freedom of Information Officer
AFC Bldg., 61 Forsyth Street, S.W., 9th Floor (4PM/IF)
Atlanta, GA 30303-8960

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and relevant U.S. Environmental Protection Agency (EPA) regulations set forth in 40 C.F.R. part 2, subpart A, Our Children's Earth Foundation (OCE) and Ecological Rights Foundation (ERF), hereby request the following information concerning EPA's review, approval, or disapproval of the Florida's water quality standards set forth below.

1. Please provide any documents constituting, describing, or otherwise concerning actual or proposed revisions to Florida Administrative Code Chapter 2010-277, Subsection(1)(c) of Section 4, 403.088 regarding water pollution operation permits conditions which was submitted to EPA for approval by the State of Florida on December 27, 2010, including but not limited to any correspondence between EPA and the U.S. Fish and Wildlife Service, National Marine Fisheries Services, or any other state or federal agency relating regarding EPA's review, approval, or disapproval of this proposed water quality standard;
2. Please provide any notices of intent to be sued under the Clean Water Act or Endangered Species Act relating to EPA's review, approval, or disapproval of Florida Administrative Code Chapter 2010-277, Subsection(1)(c) of Section 4, 403.088. In addition, we request any state or federal filed or proposed complaints, consent decrees, and/or state or federal court orders that pertain to or otherwise affect EPA's review, approval, or disapproval of this proposed water quality standard;
3. Please provide any documents constituting, describing, or otherwise concerning actual or proposed revisions to Florida Administrative Code Section 62-302.532, Estuary-Specific Numeric Interpretations of the Narrative Nutrient Criterion, which was submitted to EPA for approval by the State of Florida on May 22, 2015, including but not limited to any correspondence between EPA and the U.S. Fish and Wildlife Service, National Marine Fisheries Services, or any other state or federal agency relating regarding EPA's review,

approval, or disapproval of this proposed water quality standard;

4. Please provide any notices of intent to be sued under the Clean Water Act or Endangered Species Act relating to EPA's review, approval, or disapproval of Florida Administrative Code Section 62-302.532. In addition, we request any state or federal filed or proposed complaints, consent decrees, and/or state or federal court orders that pertain to or otherwise affect EPA's review, approval, or disapproval of this proposed water quality standard;
5. Please provide any documents constituting, describing, or otherwise concerning EPA's review of Florida Administrative Code Section 62-4.242(3)(a)2, which was submitted by the State of Florida and disapproved by EPA on November 12, 2014, including but not limited to any correspondence between EPA and any other federal or state agencies regarding EPA's disapproval. In addition, please include any documents relating to any further revisions or proposals for this WQS in response to EPA's disapproval;
6. Please provide any notices of intent to be sued under the Clean Water Act or Endangered Species Act relating to EPA's disapproval of Florida Administrative Code Section 62-4.242(3)(a)2. In addition, we request any complaints, consent decrees, and/or state or federal court orders that pertain to or otherwise affect EPA's disapproval or subsequent revisions or proposals regarding this WQS;
7. Please provide any documents constituting, describing, or otherwise concerning which subsections or other portions of Florida State Admin. Code Section 62-302, Surface Water Quality Standards, that "are not in effect for Clean Water Act purposes" as indicated by EPA's website, <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-florida#fed>;
8. Please provide any notices of intent to be sued under the Clean Water Act or Endangered Species Act relating to EPA's review, approval, or disapproval of subsections or other subparts of Florida Administrative Code Section 62-302. In addition, we request any complaints, consent decrees, and/or state or federal court orders that pertain to or otherwise affect EPA's review, approval, or disapproval of any subsections or subparts of water quality standards found in this section;
9. Please provide any documents constituting, describing, or otherwise concerning which subsections or other portions of Florida State Admin. Code Section 62-303, Identification of Impaired Surface Waters, that "are not in effect for Clean Water Act purposes" as indicated by EPA's website, <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-florida#fed>;
10. Please provide any notices of intent to be sued under the Clean Water Act or Endangered Species Act relating to EPA's review, approval, or disapproval of subsections or other subparts of Florida Administrative Code Section 62-303. In addition, we request any complaints, consent decrees, and/or state or federal court orders that pertain to or otherwise affect EPA's review, approval, or disapproval of any subsections or subparts of water quality standards found in this section;

40 C.F.R. section 2.112 requires EPA to issue a written determination to OCE and ERF within ten working days that this request was received and logged in by EPA stating which of the requested records will, and which will not, be released and the reason for any denial of any portion of this request. As provided by 40 C.F.R. § 2.112(e), EPA may extend this obligation furnishing written notice to the requestor within the basic 10-day period stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension: (1) there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) there is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of EPA.

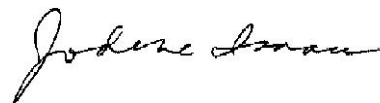
We request that to the extent that EPA can do so, the OCE and ERF be furnished with electronic copies of the above documents (to minimize the expense and burden of copying). We point out that FOIA requires EPA to provide copies of requested documents "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B).

Pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 5 U.S.C. section 552(a)(4)(A)(iii) and 40 C.F.R. section 2.120(d), we hereby request a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents, in accord with the attached fee waiver statement.

EPA staff may contact me at (510) 847-3467 or via email at jisaacs@enviroadvocates.com to further discuss EPA's response to this request.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jodene Isaacs".

Jodene Isaacs

Encl: *Attachment 1 (Fee Waiver Request)*

Attachment 1
Fee Waiver Request

Attachment to Freedom of Information Act (FOIA) Request Letter: Fee Waiver Request

Pursuant to 40 C.F.R. section 2.120(d), the U.S. Environmental Protection Agency (EPA) applies a six factor test in determining whether to grant a fee waiver for FOIA requests. Requestors Our Children's Earth Foundation (OCE) and Ecological Rights Foundation (ERF) address each of these six factors below. As shown below, OCE and ERF should be granted a fee waiver.

1. The subject matter of the requested records must specifically concern identifiable operations or activities of the government. A request for access to records for their informational content alone does not satisfy this factor.

OCE's and ERF's Response: OCE's and ERF's FOIA request asks for documents relating to the review, approval, or disapproval of Florida's Water Quality Standards (WQS) by the EPA. EPA's review, approval, or disapproval of WQS submitted to EPA pursuant to requirements of the Clean Water Act is clearly an "identifiable operations or activities of the government." Accordingly, OCE's and ERF's request meets this criterion.

2. For the disclosure to be likely to contribute to an understanding of specific government operations or activities, the releasable material must be meaningfully informative in relation to the subject matter of the request.

OCE's and ERF's Response: OCE's and ERF's FOIA request is narrowly targeted to documents that illuminate the process and timeliness of EPA's response to WQS submitted by the State of Florida or the drafting of WQS for Florida by EPA. These documents will provide information pertinent to the quality of waters in the State of Florida, in that delays in the approval or issuance of WQS constitute delays in the implementation of the Clean Water Act, a matter of concern to OCE and ERF. The requested documents will also provide information regarding EPA's compliance with the requirements of the Clean Water Act. These documents will allow OCE and ERF to understand more fully how the WQS in Florida are regulated. Accordingly, the documents are meaningfully informative to OCE's and ERF's understanding of the EPA's implementation of WQS under the Clean Water Act.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. One's status as a representative of the news media alone is not enough.

OCE's and ERF's Response: Disclosure of the documents will promote the understanding of the general public in a significant way because OCE and ERF will analyze the information and make their conclusions known to their members, local water quality advocate groups as well as similar groups in other states, and the public at large via press releases and by posting our analysis of the information on one or more internet web sites or citizen group email broadcast "systems" (including the Clean Water Action Network). There has been significant environmental group and media focus on whether the current administration has sharply curtailed enforcement of the environmental laws as part of an overall approach of weakening environmental laws and

programs to create a more favorable business climate. The documents requested will allow OCE and ERF to provide meaningful "hard" data to the environmental community and the media on these topics. Disclosure will further allow interested members of the public to assess whether they are being excessively exposed to pollutants because state and federal governments are either not implementing strong enough environmental standards or otherwise not fully complying with the requirements of the Clean Water Act. The easiest way for members of the public to learn this quickly will be by reviewing EPA decisions applicable to WQS proposed by states or the EPA itself.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities.

OCE's and ERF's Response: Disclosure of the requested information will significantly contribute to the public's understanding of government operations, specifically, EPA's review and approval of water quality standards in Florida. As noted, OCE and ERF intend to analyze the requested information and will publicize their analysis to their members, other environmental groups, and to the public at large via press releases and other means. In particular, the requested information will inform the public as to whether EPA is likely to timely execute its duties under the CWA relating to the various WQS submitted to EPA by the State of Florida. EPA's role in executing this process and its timeliness is not generally known by the public. Thus, OCE's and ERF's request and subsequent dissemination will enhance public knowledge. Accordingly, the public will gain knowledge and understanding concerning the ability of EPA to execute its duties under the Clean Water Act. Many of OCE's and ERF's members in Florida have indicated their concern regarding adequate environmental protection of their waters. This is also a national public policy concern. Water pollution throughout the United States adversely affects millions of people, and adequate, efficient implementation and enforcement of environmental laws is critical for the public health of millions.

OCE and ERF have a demonstrated ability to disseminate the problematic features of agency activities to a wider public audience, by litigation as well as the other means. Factors indicating an ability to disseminate information to the public include publication on an organization's website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003). OCE and ERF have successfully challenged the EPA's delay in approving or drafting WQS for the state of California, among many other challenges. OCE and ERF have also demonstrated their ability to disseminate information to the public, as evidenced by its upkeep of their respective websites and social media, their mention on other environmental groups' websites, and their ability to attract press coverage for their various lawsuits.

5. The extent to which disclosure will serve the requester's commercial interest, if any.

OCE's and ERF's Response: OCE is a non-profit public benefit corporation organized under the laws of California, with its main office in San Francisco, California. OCE promotes public awareness of domestic and international environmental impacts through information dissemination, education, and private enforcement of environmental protection statutes. To

further its goals, OCE actively seeks federal and state agency implementation of state and federal water quality laws, including the CWA, and as necessary, directly initiates enforcement actions on behalf of itself and its members. OCE enforcement cases aim to achieve public access to government information, ensure proper implementation of environmental statutes and permitting, and enjoin illegal violations. Our board and staff are representative of the diverse communities we work with and we have an active membership of people from all over the United States.

ERF is a non-profit public benefit corporation organized under the laws of California, with its main office in Garberville, California. ERF's purpose is to educate the public about environmental practices which cause harm to human health, the environment and other natural resources, and to seek redress from those harms through litigation or alternative dispute resolution. ERF represents citizens in protecting waterways from pollution, securing the multitude of benefits that flow from clean, vibrant waters: safe drinking water, abundant and diverse wildlife populations, healthy recreational opportunities, and economic prosperity from commercial fishing, tourism, and other commercial activities that depend on clean water. To further its goals, ERF actively seeks federal and state agency implementation of state and federal water quality laws, including the CWA, and as necessary, directly initiates enforcement actions on behalf of itself and its members.

Accordingly, OCE and ERF have no commercial interest in the information requested. Rather, OCE and ERF are seeking the information to ensure that WQS are timely implemented and to assist in efforts to advocate that the appropriate state, federal, or private entities take needed actions to ensure the prompt approval and implementation of updated WQS. OCE's and ERF's goals in urging enforcement of and compliance with environmental laws is not for any private financial gain, but serves only to vindicate the larger public interest in compliance with environmental laws designed to protect ecosystems and the species that live therein.

6. The extent to which the identified public interest in the disclosure outweighs the requester's commercial interest.

OCE's and ERF's Response: OCE and ERF have no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information necessarily outweighs any commercial interest in this request. For the above reasons, OCE and ERF respectfully request a fee waiver pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(k) for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

We also base our request for a fee waiver on the following additional authorities.

The law **requires** that records be furnished without charge or at a reduced charge when requesters are able to demonstrate that (1) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. 552(4)(a)(iii); 40 C.F.R. 2.107(l)(1); *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003) [emphasis added].

(a) Rule of liberal construction. FOIA's fee waiver provision is to be liberally construed in favor of noncommercial requesters. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The major purpose of the 1986 amendments was to remove roadblocks and technicalities that agencies have used to deny fee waivers. *McClellan*, 835 F.2d at 1284. A request for fee waiver need only be reasonably specific and nonconclusory. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

Requesters make a prima facie case for a fee waiver when they specify why they want the administrative record, what they intend to do with the information, and to whom they will distribute the information. *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997). The burden then shifts to the agency to establish that the denial is warranted. *Id.* In denying a fee waiver request, the agency may not "hang [its] hat on a single factor" but must assess all of the pertinent factors. *Id.* Moreover, a reviewing court owes no particular deference to an agency's restrictive interpretation of FOIA. *See Tax Analysts v. Commissioner*, 117 F.3d 607, 613 (D.C. Cir. 1997).

(b) Public interest purpose. OCE and ERF fall squarely within the category of "public interest" requesters intended to benefit from the 1986 amendments of FOIA, which expanded FOIA fee waiver provisions. This amendment was intended precisely to facilitate informational access by citizen watchdog groups that will monitor and challenge government activities. *See Better Govt. Ass'n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Indeed, this provision should be construed as a presumption that such requesters are entitled to a fee waiver, especially if the requesters will publish the information or otherwise make it available to the general public. *See Ettlinger v. Fed. Bureau of Investigation*, 596 F. Supp. 867, 873 (D. Mass. 1984).

The legislative history of the fee waiver provision indicates that "A requester is likely to contribute significantly to public understanding if the information is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government " 132 Cong. Rec. H94646 (Reps. English and Kindness). Courts have cited this legislative intent as a standard for determining that a requester qualifies for a fee waiver. *See McClellan*, 835 F.2d at 1284-86.

For the above reasons, OCE and ERF respectfully request pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 40 C.F.R. section 2.120(d) a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents.